

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BA THU NGHIEM,

Plaintiff,

v.

10-CV-6091T

**ORDER**

RONALD L. ZARRELLA and GERALD M. OSTROV,

Defendants.

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**INTRODUCTION**

Plaintiff Ba Thu Nghiem, proceeding pro se brings the instant action against defendants Gerald Ostrov and Ronald Zarrella (respectively the current and former Chief Executive Officers of Bausch & Lomb, Inc.) claiming that her rights under the United States Constitution were violated by the defendants when they discriminated against her with respect to her employment, and forced her to quit her employment at Bausch and Lomb.

The defendants move to dismiss the plaintiff's complaint on grounds that because the defendants are not state actors, they could not, as a matter of law, have violated the plaintiff's constitutional rights. For the reasons set forth below, I grant the defendants' motion to dismiss, and dismiss plaintiff's Complaint without prejudice.

**DISCUSSION**

The plaintiff, who worked for Bausch and Lomb as a research scientist, and who is of Vietnamese origin, alleges in her

Complaint that: (1) she was denied recognition for research she had performed, and that recognition was given to a Caucasian male employee; (2) Bausch and Lomb was acquired by Warburg Pincus because of plaintiff's innovative research that led to new and valuable products; (3) she was forced to quit her employment after she refused to disavow her research accomplishments; and (4) defendant Ostrov failed to stop the oppression of her by her supervisors. Plaintiff alleges that as a result of all of these acts, her constitutional rights were violated.

To state a claim for the violation of a constitutional right, the plaintiff must establish that her rights were violated by state actors, or persons acting on behalf of the State. See Dwares v. City of New York, 985 F.2d 94, 98 (2d Cir. 1993) (to state a claim under § 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States).

In the instant case, there is no suggestion that the defendants were state actors, or were acting on behalf of the State. Rather, the defendants are current or former Officers of Bausch and Lomb. Accordingly, the plaintiff has failed to state a claim for the deprivation of a constitutional right. See Szekeres v. Schaeffer, 304 F. Supp. 2d 296, 306 (D. Conn. 2004) ("Where . .

. the defendant is a private entity or individual, in order to satisfy the state action requirement, the allegedly unconstitutional conduct must be 'fairly attributable' to the state.")

Moreover, even construing plaintiff's Complaint liberally as alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, I find that plaintiff has failed to state a claim. There is no evidence that the plaintiff filed an administrative claim of discrimination with the Equal Employment Opportunity Commission against the defendants or Bausch and Lomb, as is required before bringing a claim for discrimination in Federal Court. Nor can defendants Zarrella or Ostrov be held liable for the alleged discrimination against the plaintiff, as individuals may not be held liable for discrimination under Title VII. Tomka v. The Seiler Corporation, 66 F. 3d 1295, 1313 (2d Cir. 1995) ("individual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII"). I therefore find that plaintiff has failed to properly allege a claim for discrimination based on her national origin.

#### **CONCLUSION**

For the reasons set forth above, I grant the defendants' motion to dismiss without prejudice.

ALL OF THE ABOVE IS SO ORDERED.

S/ Michael A. Telesca

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Michael A. Telesca  
United States District Judge

Dated: Rochester, New York  
June 28, 2010